No. 83-1169

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Steven Mark Holloman; Michael James Holloman; David Emerson, Jr.; and Jeffrey Todd Emerson

Petitioners,

-vs-

William P. Clark, Secretary of the Department Interior; Kenneth L. Smith, Assistant Secretary of the Bureau of Indian Affairs; John Fritz, Deputy Assistant Secretary of the Bureau of Indian Affairs; United States Department of Interior; Bureau of Indian Affairs, a subdivision of the United States Department of Interior,

Defendants.

On Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

Petition for Writ of Certiorari

Virginia Pickett
Pickett & Pickett
E. 102 Baldwin
Spokane, Washington 99207
Telephone: (509) 325-2529
Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit Court of Appeals' ruling herein, that the district court is barred under the doctrine of sovereign immunity from making an award of money damages against the federal government for violation of duties under 25 U.S.C. § 162(a) and § 163, is consistent with this Court's opinion in United States v. Mitchell, --- U.S. ---, 103 U.S. 2961 (1983).

2. Whether there is a waiver of sovereign immunity sufficient to sustain money damages against the federal government in an action for breach of duties under 25 U.S.C. § 162(a) and § 163, under the test set forth in this Court's ruling in United States v. Mitchell, supra.

LIST OF ALL PARTIES

All parties are correctly listed in the Petition for Writ of Certiorari. A Motion to Substitute Parties has been submitted requesting that those individually named federal defendants who no longer serve in the capacities originally listed be removed and the correct individual federal defendants be substituted. Additionally, the motion requests that Jeffrey Todd Emerson, petitioner, be substituted in his own behalf, because he is now of the age of majority.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	iv
GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT MAY BE INVOKED	v
STATUTES INVOLVED	v
STATEMENT OF THE CASE	1
ARGUMENT	6
CONCLUSION	13

APPENDIXES

A.	Findings of Fact and Conclusions of Law of district court, entered October 2, 1981.	A-1
B.	Judgment of district court, entered October 28, 1981.	B-1
C.	Opinion of Ninth Circuit Court of Appeals, dated June 20, 1983.	C-1
D.	Order of Ninth Circuit Court of Appeals denying the petition for rehearing, dated October 18, 1983.	D-1
E.	Statutes	E-1

TABLE OF AUTHORITIES

CASES

	PAGE
Andrus v. Charlestone Stone Products Co., 436 U.S. 604 (1978)	10
Helvering v. Gowran, 302 U.S. 238 (1937)	11,12
Holloman v. Watt, 708 F.2d 1399 (9th Cir. 1983)	iv,6
Rowe v. United States, 633 F.2d 799 (9th Cir. 1980)	12
United States v. Mitchell, --- U.S. ---, 103 S.Ct. 2961 (1983)	4,6,7,8,9,10,11
United States v. Mitchell, 445 U.S. 539 (1980)	6,7
United States v. Testan, 424 U.S 392 (1976)	6,7

STATUTES

25 U.S.C. § 162(a)	v,8,9,11
25 U.S.C. § 163	v,3,8,9,11
28 U.S.C. § 1331	3
28 U.S.C. § 1491	v,4,7,8,10
28 U.S.C. § 1505	4

OPINIONS BELOW

The United States District Court for the the Eastern District of Washington entered Findings of Fact and Conclusions of Law on October 2, 1981, and Judgment herein on October 28, 1981. Both the findings and the judgment are unreported. Findings of Fact and Conclusions of Law are reproduced in the appendix to the present petition for certiorari, A-1 through A-25. The Judgment is reproduced in the appendix to this petition, B-1 through B-5. The first Opinion of the Ninth Circuit Court of Appeals was filed June 20, 1983 and is reported as Holloman vs. Watt, 709 F.2d 1399 (9th Cir. 1983), and is further reproduced in the appendix to this petition, C-1 through C-10. The Order denying plaintiffs/petitioners Petition for Rehearing was filed by the Ninth Circuit Court of Appeals on October 18, 1983. This order is reproduced in the appendix to this petition, D-1 through D-4.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Court of Appeals filed its original opinion on June 20, 1983. The order by the Court of Appeals denying the petition for rehearing was filed October 18, 1983. This Court's jurisdiction to review this matter is derived from 28 U.S.C. § 1254.

STATUTES INVOLVED

The statutes referred to herein are 25 U.S.C. § 162(a) and § 163 and the Tucker Act, 28 U.S.C. § 1491. These statutes are attached to this petition in the appendix, E-1 through E-6.

STATEMENT OF THE CASE

The Holloman brothers and their cousins, the Emerson brothers, petitioners herein, are members of the Colville Confederated Tribes (hereinafter referred to as the Tribes). The petitioners were enrolled within the Tribes in 1966. Petitioners' respective enrollments with in the Tribes were approved by the Department of the Interior (hereinafter referred to as the Department). At the time the petitioners were enrolled, the question was raised as to the blood quantum of petitioners. However, since petitioners' ancestors were listed on the Tribes' base roll with sufficient blood to entitle petitioners to enrollment, the Department, acting through the Bureau of Indian Affairs (hereinafter referred to as the BIA) recommended their enrollments and subsequently approved said enrollments. Thereafter petitioners were afforded all benefits due members of the Tribes, including receipt of their respective shares of trust funds distributed by the Department.

In 1971 the BIA instructed the Tribes to

disenroll petitioners and remove petitioners from the rolls of those Indians eligible to receive trust funds.[1] These actions were not taken. In 1974 the BIA again instructed the Tribes to remove petitioners from the rolls. Beginning in 1974 the BIA terminated payment to petitioners of trust funds; subsequently, petitioners were denied any tribal benefits. Eventually, in 1978 the Tribes formally disenrolled petitioners.

After exhausting their administrative remedies petitioners commenced this action against the Department, its sub-agency the BIA, and several officials of the Department. Petitioners sought relief in the form of declaratory judgments, injuctive relief, mandamus, payment of back trust funds, damages, attorney's fees and costs. This matter was tried June, 1981 before the Honorable Smithmore P. Myers, Magistrate for the Eastern District of Washington. The Court entered Findings of Fact and Conclusion of Law (See appendix A-1 through

1. These instructions were based upon the alleged blood discrepancies which had been discussed in 1966 prior to their enrollments.

A-25) on October 2, 1981. Therein, the Court stated that its jurisdiction was based upon "28 U.S.C. § 1331 as that section applies to disputes over the construction of 25 U.S.C. § 163 and the Fifth Amendment to the United States Constitution." (Conclusion of Law No. 1 at appendix A-16)[2] On October 28, 1981 the trial court entered judgment awarding petitioners the following relief:

(1) Petitioners' respective shares of trust funds distributed to members of the Tribes from 1974 to the date of judgment, plus interest;

(2) A Writ of Mandamus directing the defendants federal government to correct the blood quantums of petitioners' ancestors on the base roll under 25 U.S.C. 163; and

(3) Writs of Mandamus directing defendants of petitioners' eligibility to receive

---

2. Any further contentions as to the district court's jurisdiction in this matter is the essence of the grounds upon which the petitioners seek certiorari and is fully discussed in the argument portion herein.

and defendants' obligation for payment to petitioners of future distribution of trust funds; and

(4) Damages. (See Appendix B-1 through B-4.)

The defendants/federal government appealed only the award of damages.

By an opinion filed June 20, 1983, the Ninth Circuit Court of Appeals reversed on the issue of damages on the basis that the government had not waived sovereign immunity. On June 27, 1983, this Court filed its opinion in United States v. Mitchell, --- U.S. ---, 103 S.Ct. 2961 (1983), holding that the Tucker Act (28 U.S.C. § 1491) and its counterpart, the Indian Tucker Act (28 U.S.C. § 1505), constituted a waiver of sovereign immunity for the award of money damages wherein the action against the federal government is based upon "'the Constitution, or any Act of Congress, or any regulation of any executive department.'". 103 S.Ct. at 2968.

Based upon the Mitchell decision the petitioners timely filed a petition for rehearing

with the Court of Appeals. On October 18, 1983, the Court of Appeals denied the petition for rehearing, with Judge Fletcher dissenting. (See Appendix D-1 through D-4.)

ARGUMENT

In Holloman v. Watt, 708 F.2d 1399 (9th Cir. 1983), the Ninth Circuit Court of Appeals reversed the district court's damage award, predicating that reversal on the doctrine of sovereign immunity. Following the original Holloman opinion, but prior to a final order on petitioners' petition for rehearing, this Court decided United States v. Mitchell, --- U.S. --- 103 S.Ct. 2961 (1983). The Ninth Circuit's original opinion and that court's split decision denying petitioners' request for rehearing are plainly at odds with the pronouncements of this Court in United States v. Mitchell, supra.

The Ninth Circuit's discussion generally regarding a waiver of sovereign immunity relies primarily upon cases whose force and effect are significantly diminished by Mitchell, ie. United States v. Mitchell, 445 U.S. 539 (1980) and United States v. Testan, 424 U.S. 392 (1976). (See Appendix C-5 and C-6)

Of even greater importance herein is the Ninth Circuit's failure to recognize that the

Tucker Act, pursuant to the 1983 Mitchell holding, provides an independant waiver of the doctrine of sovereign immunity for breaches of Indian trust relationships. 103 S.Ct. at 2965, 2967. This Court specifically held that the Tucker Act constituted a waiver of sovereign immunity in all claims within that Act. (103 S.Ct. at 2965 and 2967.) The Court squarely addressed language in United States v. Testan, supra, and the 1980 Mitchell opinion[3] to the contrary by stating that the language in the two previous cases was unnecessary and "should be disregarded." 103 S.Ct. at 1967.

Mitchell develops a two-step inquiry regarding a plaintiff's access to damages against the federal government for breaches of a trust relationship. Having determined that the Tucker Act provides the prerequisite jurisdictional

---

3. This 1980 case of United States v. Mitchell, 445 U.S. 535 will not be referred to again. Therefore, all other references in this petition are to United States v. Mitchell — U.S. —, 103 S.C.t 2961 (1983)

waiver of the doctrine of sovereign immunity, the plaintiff must still establish a substantive right to an award of damages. 103 S.Ct. at 2967-68.

Since, however, the Ninth Circuit's ruling is limited to reversing on the basis of the doctrine of sovereign immunity as a bar to petitioners' damages, it would appear that, the single pertinent inquiry is: Whether petitioners may assert the Tucker Act as a basis of subject matter jurisdiction (thus invoking the waiver of sovereign immunity set forth in Mitchell for breaches of Indian trust relationships)?

Petitioners did not plead the Tucker Act as a jurisdictional basis. However, it is strenuously urged that the Tucker Act, as a basis for subject matter jurisdiction over Indian trust violations by the federal government, may be validly asserted if the facts of the complaint support the assertion that the lawsuit is one that clearly involves the breach of trust under 25 U.S.C. § 162(a) and § 163, with-

out regard to whether or not the specific words "breach of trust" were used.

An examination of the record, specifically the district court's Findings of Fact and Conclusions of Law (See specifically Appendix A-15 through A-24), demonstrates that this action involves violations of the federal government's duty (and ultra vires actions of the federal government) under 25 U.S.C. § 162(a) and § 163, trust statutes which are specifically cited in Mitchell as the type of statute creating a substantive right to damages. Judge Fletcher, in her dissent from the majority's denial of petitioners' request for rehearing, specifically noted:

> Although [petitioners] did not use the phrase "breach of fiduciary duty" below, the gravamen of their action is a breach of duty owed them under a statute that the Supreme Court recognized in Mitchell created a trust relationship.

Appendix D-3. If it is accepted, as Judge Fletcher posits, that the petitioners have made out a case for a breach of duty owed them by the federal government under a statute which creates a trust relationship, then pursuant to Mitchell, sovereign immunity is waived under

the Tucker Act, even though that Act may not have been specifically pleaded. Andrus v. Charlestone Stone Products Co., 436 U.S. 604 (1978), wherein the Court states:

> Nor does it matter that the complaint does not in so many words assert § 1331(a) as a basis of jurisdiction, since the facts alleged in it are sufficient to establish such jurisdiction and the complaint appeared jurisdictionally correct when filed.

436 U.S. at 608 note 6.

Petitioners respectfully suggest that the doctrine of sovereign immunity has been waived, and that the Ninth Circuit's ruling to the contrary is incorrect.

It is clear that petitioners do meet the second phase of the Mitchell test, namely that they have a substantive right to an award of damages. The majority in the Ninth Circuit's order denying rehearing concedes that this case involves breaches of duty by the federal government under identical statutes referenced by this Court in Mitchell. (See Appendix D-1 through D-2.)

In that regard the Mitchell court stated, after referring to a number of areas in which the government "assumes such elaborate control", 103 S.Ct. at 2972, the following:

> All of the necessary elements of a common-law trust are present: A trustee (United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).

103 S.Ct. at 1972. Footnote omitted.

This particular theory of damages could not have been specifically argued herein since Mitchell was not decided until after the case had been tried. (See Judge Fletcher's reference to this in her dissent, at appendix D-3 and D-4.) However, the gravamen of the petitioners' damage argument was fully argued and the district court's Findings of Fact and Conclusions of Law demonstrate the award was based on a breach of duty under 25 U.S.C. § 162(a) and § 163, proximately causing the petitioners' damages. In any event, as stated in Helvering v. Gowran, 302 U.S. 238, 245 (1937), the award must be affirmed if it is correct in principal. Therein the court specifically states:

> In the review of judicial proceedings the rule is settled that if the decision below is correct it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.

302 U.S. at 245; citations omitted.

In conclusion, the Ninth Circuit's ruling that sovereign immunity barred petitioners' damage claim, it is respectfully suggested, is in error. Petitioners respectfully request that this Court rule that the district court had jurisdiction [4] to award damages to petitioners herein and said damage award was proper.

---

4. Although not the subject of this petition for writ of certiorari, petitioners assert that under Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), the district court had jurisdiction to award money damages in excess of $10,000. Rowe stands for the proposition that where a plaintiff brings an action for review of federal agency actions, and a corresponding award of damages in excess of $10,000, the damage amount does not divest the district court of jurisdiction to grant all relief requested. 633 F.2d at 802. Thus, petitioners take issue with Judge Fletcher's comment in the dissent (See Appendix D-4) that the matter should be remanded to the Court of Claims for a determination of damages. It is petitioners' position that, in the interest of judicial economy, the district court was the only proper forum in which the action could have brought and decided.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted as to the questions presented herein.

DATED this 13th day of January, 1984.

PICKETT & PICKETT

Virginia Pickett
Attorney for the
Petitioners
E. 102 Baldwin
Spokare, WA 99207
(509) 325-2529

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
)ss
County of Spokane)

Virginia Pickett being duly sworn upon oath deposes and says: That I have served the foregoing "Petition of Certiorari" upon all parties by causing three (3) copies thereof to be sent by first class U.S. mail, postage prepaid, on January 14, 1984 the following:

William P. Clark
Secretary of the Department of Interior
18th & C Sts NW
Washington, D.C. 20240

Kenneth L. Smith
Assistant Secretary of the Bureau of Indian Affairs
18th & C Sts NW
Washington, D.C. 20240

John Fritz
Deputy Assistant Secretary of the Bureau of Indian Affairs
1951 Constitution Ave. NW
Washington, D.C. 20245

Solicitor General
Department of Justice
Washington, D.C. 20530

Claire McGuire
Department of Justice
Land Division
Benjamin Franklin Station
P. O. Box 7415
Washington, D C. 20044

Virginia Pickett
PICKETT & PICKETT
Attorneys at Law
E. 102 Baldwin
Spokane, WA 99207
(509) 325-2529

SUBSCRIBED AND SWORN to me before this

_____day of January 14, 1984.

NOTARY PUBLIC in and
for the State of
Washington, residing at
Spokane

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

* * * * * * * * * * * * * *

STEVEN MARK HOLLOMAN; MICHAEL JAMES HOLLOMAN; DAVID EMERSON, JR.; and JEFFREY TODD EMERSON, Minor, by his father and next friend, DAVID EMERSON, Plaintiffs, v. CECIL ANDRUS, Secretary of the Department of Interior; FOREST GIRARD, Assistant Secretary of the Bureau of Indian Affairs; SIDNEY MILS, Acting Commissioner of the Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, a subdivision of the United States Department of Interior, Defendants.	Civil No. C-79-363 FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 22, 23 and 24, 1981, the above-captioned case was tried before the undersigned Magistrate by written consent of the parties. The plaintiffs were represented by Kerry Pickett and Virginia Pickett of Spokane. The defendants were represented by James J. Gillespie, United States Attorney, and Vernon

Peterson, an attorney from the Department of the Interior. Robert Pirtle appeared as amicus for the Colville Confederated Tribe. Having reviewed the pleadings and the file in this matter and having carefully considered the testimony and exhibits at trial and the argument of counsel, the Magistrate makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. The four plaintiffs in this matter were born on the following dates:

Name	Date of Birth
Steven Mark Holloman	April 6, 1960
David Rollin Emerson,Jr.	May, 1961
Michael James Holloman	October 2, 1961
Jeffrey Todd Emerson	October 12, 1962

2. The parents of Steven Mark Holloman and Michael James Holloman are David J. Holloman, a non-Indian, and Helen L.(Campbell) Holloman, an Indian, listed on the 1937 census roll as possessing 1/2 Colville Indian blood.

3. The parents of David Rollin Emerson, Jr., and Jeffrey Todd Emerson are David R. Emerson, a non-Indian, and Elizabeth (Campbell) Emerson,

an Indian. Mrs. Emerson is not listed on the 1937 census roll, but it is undisputed that Mrs. Emerson and Helen L. (Campbell) Holloman are full sisters.

4. Amendment III to the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation provides in pertinent part:

Amendment III

> ARTICLE VII, MEMBERSHIP OF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION. -- There shall be added a new provision governing membership of the Confederated Tribes of the Colville Reservation which shall read as follows:
>
> Section M. --The membership of the Confederated Tribes of the Colville Reservation shall consist of the following:
>
> (a) All persons of Indian blood whose names appear as members of the Confederated Tribes on the official census of the Indians of the Colville Reservation as of January 1, 1937, provided that, subject to the approval of the Secretary of the Interior corrections may be made in said roll within two years from the adoption and approval of this amendment.

5. Amendment V to the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation provides in pertinent part:

AMENDMENT V

There shall be added to AMENDMENT III, MEMBERSHIP OF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, a new provision governing membership of the said tribes which shall read as follows:

Section 3. After July 1, 1959, no person shall be admitted to membership in the Confederated Tribes of the Colville Reservation unless such person possesses at least one-fourth (¼) degree blood of the tribes which constitute the Confederated Tribes of the Colville Reservation.

6. David Rollin Emerson applied to be enrolled in the Colville Confederated Tribe (the tribe) on June 16, 1961, but was denied enrollment.

7. On the following dates the Tribal Business Council approved Council Resolutions for the enrollment of the four plaintiffs into the tribe:

Enrollee	Council Resolution No.	Date
David Rollin Emerson, Jr.	1966-12	1-13-66
Steven Mark Holloman	1966-128	5-20-66
Michael James Holloman	1966-129	5-20-66
Jeffrey Todd Emerson	1966-155	5-20-66

8. The aforesaid Council Resolutions were approved by Charles B. Rovin, the Acting Deputy

Assistant Commissioner of the Bureau of Indian Affairs by two separate letters dated September 7, 1966. Said letters were received by the Colville Indian Agency on September 15, 1966.

9. The Council Resolution approving the membership of Michael James Holloman and Jeffrey Todd Emerson called for the granting of membership to these two individuals by adoption.

10. The plaintiffs and one Jennifer Lynn Gunn have some common ancestors. The plaintiffs' maternal great, great grandmother and grandfather are Jennifer Lynn Gunn's paternal great grandmother and grandfather. The names of the common ancestors appear to be William Gunn and Katherine Pierre Gunn. In 1910, Katherine Pierre Gunn, then a widow, married Thomas Adolph and thus became Katherine Pierre Gunn Adolph.

11. On December 5, 1969, the Tribal Business Council approved Council Resolution 1969-441 which approved the enrollment of Jennifer Lynn Gunn into the tribe.

12. On January 28, 1970, A. G. Van Risswick, Acting Assistant Area Director of the Bureau of

Indian Affairs wrote to the Commissioner of Indian Affairs and recommended that unless a degree correction pertaining to Jennifer Lynn Gunn would be approved then she would not be eligible for enrollment, since she would possess only 11/64 degree of Colville blood.

13. On September 23, 1971, Deputy Commissioner Crow wrote to Mr. Melvin Tonasket of the Colville Business Council informing the tribe that the blood degree correction for Jennifer Lynn Gunn to 33/128 degree Colville was approved. This correction provided Ms. Gunn with the required 25% Colville blood degree needed for enrollment in the Colville tribe. By that same letter the blood degree of Jennifer Lynn Gunn's paternal grandfather, Peter Gunn, was corrected to show a Colville blood degree of 3/4 instead of 1/2. This correction was based upon an analysis of the blood degrees of Peter Gunn's parents (Jennifer Lynn Gunn's paternal great grandmother and grandfather) Katherine Pierre Gunn Adolph and William Gunn. Deputy Commissioner Crow also authorized the Colville Business

Council to correct the blood degrees ascribed to the descendants of Katherine Pierre Gunn Adolph and William Gunn. The Council was instructed to notify the head of each family descending from Katherine Pierre Gunn Adolph and William Gunn to provide an opportunity to show cause why the blood degree correction should not be made. No notice was ever given to the plaintiffs or their parents.

14. The daughter of William Gunn and Katherine Pierre Gunn Adolph is Agnes Adolph. Agnes Adolph is plaintiffs' maternal great grandmother. Agnes Adolph is listed on the 1937 roll as a full blooded Colville Indian with the basic enrollment number of 29.

15. The full degree of Colville Indian blood ascribed to Agnes Adolph was changed to 3/4 degree of Colville Indian blood by handwritten notation on the 1937 census roll. Mr. Tommy Waters, the enrollment officer for the Colville Tribe testified at trial that the notation had been made sometime prior to 1976 when he became enrollment officer for the tribe. The

notation itself makes the following reference: "I.D. let 09-23-71 in Jennifer Lynn Gunn case." The Magistrate believes and finds that the reference is to the letter authored by Deputy Commissioner Crow discussed in Finding of Fact 13 above.

16. The role of the 1937 tribal census roll in determining tribal membership has been the focal point of much discussion. In May of 1964 a representative of the Bureau of Indian Affairs communicated with Harvey Moses, Chairman of the Colville Business Council. Mr Moses was informed that it was the Bureau's position:

> that in determining the degree of Indian blood of descendants of persons on the January 1, 1937, census roll, the blood degree shown for the ancestor on the January 1, 1937, census roll be used, except that in those cases where the degree of Indian blood has changed and such changes have been sanctioned by the Commissioner or his authorized representative. No other change in blood degree will be considered unless the 1937 enrollee or one of his descendants who is an applicant for enrollment questions the degree of blood shown on the 1937 roll and requests <u>in writing</u> that the degree be changed.

The Tribal Council responded to the bureau's

position in June of 1965 by the enactment of tribal resolution 1965-196. Resolution 1965-196 set forth the tribe's position in opposition to the bureau's policy and adopted the recommendation of the enrollment committee which provided that the Tribal Council be granted authority to make blood corrections consistent with official records on file under the jurisdiction of the tribal office.

In October of 1965 the business council reversed its position by the adoption of resolution 1965-326 which rescinded resolution 1965-196.

In May of 1966 the business council aligned its position regarding the utilization of the 1937 census roll for blood degree determinations with that of the Bureau of Indian Affairs. Tribal resolution 1966-142 cited the previously quoted language from the letter addressed to Harvey Moses and then concluded that the blood degree of Colville Indians shall be determined by the 1937 basic membership roll unless otherwise changed and approved by the Commissioner of

Indian Affairs.

17. The Bureau of Indian Affairs has taken the position that it has the sole and exclusive authority to determine who is to be listed on the tribal roll for the singular purpose of distribution of trust funds. The bureau's policy is clearly set forth in the January 13, 1976 letter from Raymond Butler, the Acting Commissioner of Indian Affairs to the Area Director of the Portland office of the Bureau of Indian Affairs. The authority of the bureau in this regard was confirmed at trial by the testimony of Mitchell Bush, Chief of the Branch of Tribal Enrollment Services of the Bureau of Indian Affairs.

18. On July 2, 1974, Francis Briscoe of the Portland Office of the Bureau of Indian Affairs wrote to Eddie Palmanteer, Jr., Chairman of the Colville Business Council, and informed him that due to the corrected blood degrees in its case of Jennifer Lynn Gunn, the Emerson and Holloman children (plaintiffs) were not eligible for membership enrollment in the Colville Tribe.

Additionally, Mr Briscoe stated that action should be taken to remove the plaintiffs' names from the roll as they are not longer eligible for future payments and that the same procedures as used in the past should be followed when action is taken to disenroll the plaintiffs.

19. Plaintiffs have not received any per capita or dividend payments since March 31, 1974. Plaintiffs were also denied numerous benefits which accompany tribal membership. At trial, Dale Kohler, a member of the Colville Confederated Tribe Business Council, identified the following tribal benefits which plaintiffs were barred from enjoying upon their disenrollment:

A. Tribal Employment Preference

Enrolled members of the Colville tribe are given highest priority in job placement on the reservation. The tribe is the largest single employer in north central Washington. The significance of tribal employment will become greater in the near future due to the existence of an extensive molybdenum mining operation which will commence in the early 1980's.

B. Wood Cutting Benefits

Enrolled members may cut and personally use as much reservation timber as they desire without the need for a permit.

Enrolled members may also procure wood cutting permits for the purpose of cutting and selling wood commercially. As a practical matter, nonenrolled members may not cut tribal reservation timber.

C. Tribal Hunting Rights

Enrolled members are allowed to hunt game on the reservation during certain game seasons. The hunted game include upland game birds deer, and elk. The testimony at trial indicates that the hunting conditions on the reservation are excellent.

D. Tribal Fishing Rights

Enrolled members of the tribe are allowed to fish in the streams and lakes located upon the reservation without seasonal limitations. Nonenrolled members may fish from April 1st through December 15th only. Nonenrolled members are also limited to certain fishing locations. Testimony indicated the fishing conditions on the reservation are excellent.

E. Tribal Trust Land

Enrolled members of the tribe are allowed to purchase and own tribal trust land. Nonenrolled members may not purchase trust land and their right to inherit trust land is an unsettled legal issue.

F. Tribal Education Grants

Enrolled members of the tribe are eligible for tribal education grants. The tribe will award a grant of at least $1,500.00 per year for college education. An enrolled member may continue to receive grants for graduate degree programs. The tribe

also awards grants in a lesser amount to those enrolled members desirous of attending a trade school. These grants are not loans and are not repayable to the tribe. Nonenrolled members are not eligible for such grants.

G. Tribal Loan Program

Enrolled members of the tribe are eligible to participate in the tribal loan program. Home loans are available at 6-1/2%, real property loans are 8-1/2%, and business loans at 10%. Nonenrolled members are not eligible to participate in this program.

H. Cultural Identification and Tribal Self-Determination

Enrolled members of the tribe enjoy a franchise right to vote in tribal elections and through this franchise can participate in the direction of the Colville Tribe. Additionally, testimony established that an enrolled member enjoys an accepted position or status within the Colville community. Nonenrolled members do not enjoy the franchise and are viewed and perceived by the Colville community differently than enrolled members.

Plaintiffs for a time were able to enjoy certain tribal membership benefits, such as health care, due to their dependency status. These benefits ceased upon their attaining the age of 18. Plaintiffs have been damaged by the deprivation of these tribal benefits. While precise determination of the specific amount of damages is difficult, determination of the fact

of damage is not. The Court finds that the two plaintiffs Emerson, who have lived in the immediate vicinity of the reservation, have suffered greater damages in being deprived of tribal benefits, than have the two plaintiffs Holloman, who have lived a considerable distance from the reservation. The Court finds that plaintiffs David Rollin Emerson, Jr., and Jeffrey Todd Emerson have been damaged by deprivation of tribal benefits from March 31, 1974 to the date of judgment in this case in the amount of $30,000 each. The Court further finds that plaintiffs Steven Mark Holloman and Michael James Holloman have been damaged by deprivation of tribal benefits from March 31, 1974 to the date of judgment in this case in the amount of $22,500 each.

20. On March 20, 1978, the Colville Business Council passed and approved resolutions 1978-192 1978-193, 1978-194, and 1978-195, which provided for the official disenrollment of the four plaintiffs by the tribe. This disenrollment action by the tribe has not been approved by the

Secretary of the Interior.

21. Plaintiffs were never personally notified by the Bureau of Indian Affairs of its decision to remove them from the tribal roll affecting their rights to receive per capita and dividend payments. Notice was provided to plaintiff's attorney Daniel Rosenfelt in response to inquiries made by Rosenfelt. The notice given to Rosenfelt was by letter dated November 4, 1976, some 27 months after Mr. Brisoe's letter indicating that plaintiffs should be disenrolled and some 62 months after the letter by Mr. Crow to Mr. Tonasket pertaining to Jennifer Lynn Gunn which instructed that a notice be given regarding the correction of blood degrees.

22. On April 5, 1977, the tribe convened a disenrollment hearing concerning the four named plaintiffs. Notice of this hearing was provided to plaintiffs on March 10, 1977. Neither the Bureau of Indian Affairs nor any other agency of the Department of the Interior has ever afforded the plaintiffs a hearing regarding the Bureau's termination of plaintiffs'

rights to receive per capita and dividend distribution.

Based upon the above Findings of Fact, the Magistrate now enters the following Conclusions of Law:

Conclusions of Law

1. The Court is vested with jurisdiction by virtue of 28 U.S.C. § 1331 as that section applies to disputes over the construction of 25 U.S.C. § 163 and the Fifth Amendment to the United State Constitution.

2. The Confederated Tribes of the Colville Reservation are not an indispensable party in this action. The Federal District Court for the Eastern District of Washington has no jurisdiction over the Confederated Tribes in this case, and the force of any judgment in this case must be solely against named defendants, officials and agencies of the United States of America.

3. The Department of the Interior through its agency, the Bureau of Indian Affairs, violated plaintiffs' rights under the Fifth Amendment to

the United States Constitution by failing to give timely and meaningful notice and wholly failing to provide an opportunity to be heard prior to removing plaintiffs' names from the tribal rolls which the Bureau utilizes in determining who is entitled to per capita and dividend payments.

4. The Department of Interior through its agency, the Bureau of Indian Affairs, acted in an ultra vires manner in correcting the Colville blood degrees ascribed to Agnes Adolph (plaintiffs' maternal great grandmother) and Eva Adolph Campbell Orr (plaintiffs' maternal grandmother) as set forth on the 1937 census roll. The Bureau committed an additional ultra vires act in forwarding the corrected blood degree determination to the Colville Tribe. The Bureau's action was ultra vires in two ways. First, the statute at issue, 25 U.S.C. § 163, provides that the roll shall be conclusive as to ages and quantum of Indian blood. There is no provision in the statute for the correction of any alleged errors which may appear on the roll.

The clear, unambiguous language of the statute provides that questions of age and quantum of Indian blood are conclusively determined by the final roll. It is argued by amicus that § 163 is an historical statute with no present day relevance. The Court is unpersuaded by this argument. The contemporary effect of the conclusive language in the statute is illustrated in the 1971 decision of Fondahn v. Native Village of Tyonek, 450 F.2d 520 (CA9 1971). Marie Fondahn was seeking recognition as a member of the Tyonek Indian tribe in Alaska. Pursuant to 25 U.S.C. § 163, the Secretary of the Interior had caused a final roll of Tyonek tribe to be made. The Secretary approved that roll on March 31, 1965. Ms. Fondahn's name did not appear on that roll. Subsequently, Fondahn filed an action for declaratory judgment and for imposition of a constructive trust on certain tribal revenues. The District Court granted summary judgment in favor of the defendant tribe. Fondahn appealed and the appellate court held that the district court erred in granting

summary judgment when the case should have been dismissed for lack of jurisdiction. The appellate court stated that the statute (25 U.S.C. § 163) makes tme membership roll approved by the Secretary conclusive and, under Martinez v. Southern Ute Tribe of Southern Ute Res., 249 F.2d 915 (CA10 1957), disputes involving membership in a tribe does not present a federal question.[1] The conclusion of the Fondahn court

1 The holding in Martinez is distinguishable from the present case in the following respects. First, the defendant in that action is the tribe, whereas in the present case it is the Secretary of the Interior. Secondly, the plaintiff in Martinez complained that her tribal privileges were denied her as a result of the actions of the defendant tribe and the individual defendants who composed the tribal council. In the instant case the deprivation is alleged to have been caused by the actions of the Secretary of the Interior through his agents in the Bureau of Indian Affairs. Finally, the language of Martinez in the issue of membership for purposes of per capita and dividend payments clearly establishes that Martinez cannot be read to call for dismissal of the present action. The court states

> [I]t has been held that 25 U.S.C. § 163 and its predecessors qualify that power of an Indian tribe where the question involved is the distribution of tribal funds and other property under the supervision and control of the federal government. (citations omited) . . . It appears that for purposes of which the tribe has complete control the tribe conclusively determines membership but where departmental action is authorized, the department may approve or disapprove the membership rolls of the tribe. 249 F.2d at 920.

was, in part, that once the roll is made final there is no power or authority to correct any error which may exist on the roll.

Therefore, it is the conclusion of the Magistrate that the 1937 census roll, which was made pursuant to 25 U.S.C. § 163, conclusively establishes the degree of Colville blood of plaintiffs' maternal great grandmother and maternal grandmother. The actions of the Secretary of the Interior through the Bureau of Indian Affairs in altering the respective degrees of Colville blood as noted on the roll for these persons were ultra vires acts.

The second way in which the Bureau acted in an ultra vires fashion concerns the Bureau's own policy on correcting inaccurate blood degrees on final rolls. This conclusion should not be construed as sanctioning the Bureau's activities in altering the final rolls, but if such activity were permissible the Bureau has done so in this case in violation of its own requirements.

The Bureau's standards regarding when cor-

rections of blood degrees would be undertaken is set forth in plaintiffs' Exhibit 14, a letter from Homer Jenkins, Acting Associate Commissioner of the Bureau of Indian Affairs to Harvey Moses, Chairman of the Colville Business Council. The policy of the Bureau as set forth by Mr. Jenkins is as follows:

> With regard to the compilation of the roll of the members of the Confederated Tribes of the Colville Reservation, it is our position that in determining the degree of Indian blood of descendants of persons on the January 1, 1937, census roll, the blood degree shown for the ancestor on the January 1, 1937, census roll be used, except that in those cases where the degree of Indian blood has changed and such changes have been sanctioned by the Commissioner, or his authorized representative. No other change in blood degree will be considered unless the 1937 enrollee or one of his descendants who is an applicant for enrollment questions the degree of blood shown on the 1937 roll and requests in writing that the degree be changed.

The underlined portion of Mr. Jenkin's statement is disturbing. There is no explanation of how or why the degree of Indian blood would change or at whose request such a change would occur. The insertion of the word "that" after "except" makes it difficult to determine what this clause means. In any event, however, under

any reasonable construction, there are no facts in this case to indicate that as a result of the procedures mentioned the blood degrees ascribed to plaintiffs' maternal great grandmother and maternal grandmother changed.

Thus, the only justification for altering the blood degrees lies in the last sentence of the excerpt from Mr. Jenkins' letter. The language of that sentence requires that either the 1937 enrollee or one of his descendants requests in writing that the degree be changed. In the present case the enrollees made no such request. More importantly, no descendant of either Agnes Adolph or Eva Adolph Campbell Orr, the two enrollees in issue, made such a request. The person who did make a request was a descendant of plaintiffs' great great uncle (Agnes Adolph's brother, Peter Gunn) but not of either one of the two enrollees who are the ancestors of the plaintiffs. Therefore, under the Bureau's own policy and standards, the blood degree change of plaintiffs' maternal great grandmother and maternal grandmother should never have been

considered. The consideration and subsequent alteration by the Bureau of the degrees was in controversion of the express policy of the Bureau and therefore ultra vires.

5. These ultra vires acts by the Secretary of the Department of the Interior through the Bureau of Indian Affairs proximately caused the improper disenrollment of the plaintiffs from the tribal roll thereby depriving plaintiffs of recognition as tribal members and of benefits attendant thereto. The causation is demonstated by the language embodied in Tribal Resolution 1966-142. The resolution states, in pertinent part:

> [T]he Colville Business Council...for and in behalf of the Colville Confederated Tribes this 20th day of May 1966 do hereby go on record as recognizing and approving that the blood degree of Colville Indians shall be determined by the January 1, 1937 basic membership roll unless otherwise changed and approved by the Commissioner of Indian Affairs or his duly authorized representative.

From this language and from the sequence of events, it is concluded that the reason the Colville Business Council disenrolled the plaintiffs was the 1974 letter from Francis Briscoe

of the Bureau of Indian Affairs to Eddie Palmanteer, Jr., instructing the tribe to take action removing the plaintiffs from the tribal role. It is equally clear from the quoted language above that had the Bureau not sent the letter to Palmanteer, the tribe's policy would have precluded the removing of the plaintiffs' names from the tribal roll.

As a consequence of the Secretary of Interior's ultra vires acts, the defendants are liable to the plaintiffs for the loss of tribal identity and the benefits attendant to being a member of the tribe, and for the per capita and dividend payments which terminated after March 31, 1974. Plaintiffs are entitled to be restored to a position of eligibility for such per capita and dividend payments from defendant: and to receive them in the future.

6. Judgment will be entered in accordance with these Findings of Fact and Conclusions of Law. To this end, the parties will submit to the Court an agreed proposed judgment by October 16, 1981. If the parties cannot agree, each

party may submit its own proposed judgment in accordance with these Findings of Fact and Conclusions of Law.

7. The Court has been informed by counsel, during and since the trial, that the Colville Business Council has been reconsidering the status of these plaintiffs. The Colville Business Council has apparently adopted a resolution recommending tribal membership for the plaintiffs. This resolution has now been submitted to the Department of Interior for approval.

In the Court's view, the pending action by the Colville Business Council does not moot the present action against government officials acting in their official capacity, and judgment should be entered in this case.

DATED this 2nd day of October, 1981.

/s/ S. P. Myers
Smithmore P. Myers
United States Magistrate

B-1

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASH NGTON

* * * * * * * * * * * * * * *

STEVEN MARK HOLLOMAN; MICHAEL JAMES HOLLOMAN; DAVID EMERSON, JR.; and JEFFREY TODD EMERSON, Minor, by his father and next friend, DAVID EMERSON, Plaintiffs, v. CECIL ANDURS, Secretary of the Department of Interior; FOREST GIRARD, Assistant Secretary of the Bureau of Indian Affairs; SIDNEY MILS, Acting Commissioner of the Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, a subdivision of the United States Department of Interior, Defendants.	Civil No. C-79-363-SPM JUDGMENT

This action came on for trial before the Court, the Honorable Smithmoore P. Myers, United States Magistrate, presiding; plaintiffs being represented by Kerry L. Pickett and Virginia Pickett of PICKETT & PICKETT; the defendants being represented by James Gillespie, United States Attorney, and Vern Peterson from

the Office of the Solicitor, Department of the Interior; and the matter having been tried on June 22-24, 1981; and the Court having entered its findings of fact and conclusions of law, it is herebq

ORDERED AND ADJUDGED as follows:

1. That the plaintiff Steven Mark Holloman recover damages from the defendants in the sum of Twenty-Two Thousand Five Hundred ($22,500.00) Dollars, with interest thereon at the rate of ten (10%) percent per annum provided by law, from the date of this judgment.

2. That the plaintiff Michael James Holloman recover damages from the defendants in the sum of Twenty-Two Thousand Five Hundred ($22,500.00) Dollars with interest thereon at the rate of ten (10%) percent per annum provided by law, from the date of this judgment.

3. That the plaintiff David Emerson, Jr., recover damages from the defendants in the sum of Thirty Thousand ($30,000.00) Dollars with interest thereon at the rate of ten (10%) percent per annum as provided by law, from the

date of this judgment.

4. That the plaintiff Jeffrey Todd Emerson recover damages from the defendants in the sum of Thirty Thousand ($30,000.00) Dollars with interest thereon at the rate of ten (10%) percent per annum as provided by law, from the date of this judgment.

5. That the plaintiffs Steven Mark Holloman, Michael James Holloman, David Emerson, Jr., and Jeffrey Todd Emerson recover from the defendants plaintiffs' allowable costs in this action.

6. That each of the four plaintiffs shall receive from the defendants the sum equalling the per capita payments and dividend payments made to each member of the Colville Confederated Tribes after March 31, 1974 to present, with interest thereon at the rate of ten percent (10%)per annum as provided by law, from the date of judgment

7. A writ of mandamus issue directing the defendants to correct the respective blood quantums as reflected on the 1937 official

census of the Colville Confederated Tribes of the plaintiffs' following ancestors:

(A) Plaintiffs' great grandmother, Agnes Adolph; said blood quantum to be corrected to 4/4 Colville;

(B) Plaintiffs' grandmother, Eva Adolph Campbell; said blood quantum to be corrected to 4/4 Colville;

(C) The mother of Steven Mark Holloman and Michael James Hollomon, Helen Campbell Holloman, said blood quantum to be corrected to 1/2 Colville.

It is adjudged that the corrected census is and shall be conclusive as to the blood quantums of plaintiffs' named ancestors.

8. A writ of mandamus issue directing defendants to restore plaintiffs to their respective positions of eligibility for receipt of per capita payments and dividend payments and any other funds (which now are or in the future may be) held in trust for distribution to members of the Colville Confederated Tribes.

9. A writ of mandamus issue directing

defendants to pay to plaintiffs their respective future per capita payments and dividend payments and any other funds (which now are or in the future may be) held in trust for distribution to members of the Colville Confederated Tribes.

DATED this 28th day of October, 1981.

/s/ S. P. Myers
Smithmoore P. Myers
United States Magistrate

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * * * * * * * * * * * * *

STEVEN MARK HOLLOMAN; MICHAEL JAMES HOLLOMAN; DAVID EMERSON, JR.; and JEFFREY TODD EMERSON; Minor, by his father and next friend, DAVID EMERSON, Plaintiffs-Appellees v. JAMES WATT, Secretary of the Department of Interior; FOREST GIRARD, Assistant Secretary of the Bureau of Indian Affairs; SIDNEY MILS, Acting Commissioner of the Bureau of Indian Affairs; United States Department of Interior; BUREAU OF INDIAN AFFAIRS, a subdivision of the United States Department of the Interiors, Defendants-Appellants.	No. 82-3096 D.C. No. CV 79-363 OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Smithmoore P. Myers, Magistrate, Presiding
Argued and Submitted January 6, 1983

Before: BROWNING, Chief Judge, FLETCHER and PREGERSON, Circuit Judges

PER CURIAM:

The government appeals a judgment awarding damages to appellees for loss of tribal privi-

leges arising out of acts of officials of the Bureau of Indian Affairs. We reverse. Appellees failed to carry their burden of showing congressional intent to waive the United States' sovereign immunity.

Appellees, the Holloman brothers and their cousins, the Emerson brothers, applied for enrollment as members of the Colville Indian Tribe in 1966. After reviewing the blood degree quantums of appellees' ancestors as listed on the 1937 Tribal roll, the Tribal Council found each appellee possessed the requisite one-fourth degree Colville blood, and enrolled each in the Tribe.

The Bureau of Indian Affairs (BIA) learned from a subsequent application for enrollment by a distant cousin of appellees that there was a discrepancy in the blood degree of one of appellees' common ancestors. Based upon the new information, the BIA determined that appellees lacked the requisite one-fourth degree Colville blood and so informed the Tribal Council. The Tribe took no action, and the BIA continued to

make per capita and dividend payments to appellees from the funds held in trust by the United States for the benefit of Tribal members. Three years later the BIA again informed the Tribal Council that appellees were not eligible "for membership enrollment with the Colville Tribe and action should be taken by the [Tribal] Business Council to remove their names from the roll as they are not eligible for future payments made to members of the Tribe." Neither the BIA nor the Tribe gave appellees notice of the enrollment problem. The BIA discontinued per capita and dividend payments to appellees. Three years later the Tribal Council gave appellees notice and a hearing on their eligibility for continued enrollment. One year later the Council disenrolled appellees from the Tribe.

In 1979 appellees brought this suit against the Department of the Interior, the Secretary of the Interior, the BIA, the Assistant Secretary of the BIA and the Commissioner of Indian Affairs (collectively referred to as "the government"). The complaint alleged that by

discontinuing per capita and dividend payments without notice and hearing the government exceeded its statutory authority and violated appellees' due process rights; and, by instructing the Council to disenroll appellees, the government caused appellees to lose tribal privileges, including the tribal employment preference, woodcutting rights, hunting and fishing rights, education grants, cultural identification and opportunities to purchase tribal lands and to take loans from the Tribe. Appellees sought restitution of per capita and dividend payments and damages for loss of tribal privileges.

During trial the BIA discovered and corrected another error on the 1937 Tribal roll. This change resulted in a determination that appellees were eligible for tribal membership and repayment of withheld per capita and dividend payments. The Council considered the new evidence and re-enrolled appellees in the Tribe. The magistrate before whom the case was tried ordered restitution of per capita and dividend payments. The magistrate also awarded damages

for loss of tribal privileges caused by the government's communitcation of corrected blood degrees to the Tribe.

The government concedes the propriety of restitution of per capita and dividend payments and has satisfied this portion of the judgment. The government contends, however, that it was immune from appellees' claim for damages because it had not waived its sovereign immunity. We agree.

"In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity...." United States v. Testan, 424 U.S. 392, 400 (1976).[1/] Where, as here, the claim against the United States does not rest upon a contract and is not for return of money paid to the government, the "entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Id. (quoting Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). Moreover,

"[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" Unites States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting Unites States v. King, 395 U.S. 1, 4 (1969)). The party who sues the United States bears the burden of pointing to such an unequivocal waiver of immunity. Cole v. United States, 657 F.2d 107, 109 (7th Cir. 1981).

Appellees argue the district court could award damages for loss of tribal rights under 28 U.S.C. § 1331 (1976), because resolution of the issue required construction of the various federal constitutional and statutory provisions. Section 1331 does not waive the government's sovereign immunity from suit. Kester v. Campbell, 652 F.2d 13, 15 (9th Cir. 1981).

Appellees argue that Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), authorizes a damage action based upon a violation of due process without an explicit waiver of sovereign immunity. We agree that waiver of sovereign immunity is not required for a Bivens-type suit. This is not

because the suit alleges a due process violation, however, but because such a suit is against the employee in his individual rather than official capacity, and is therefore not a suit against the sovereign at all. See Butz v. Economou, 438 U.S. 478, 504-05 (1978); Keene Corp. v. United States, 700 F.2d 836, 845 n.13 (2nd Cir. 1983); Inupiat Community of the Arctic Slope v. United States, 680 F.2d 122, 132 (Ct. Cl. 1982); American Ass'n of Commodity Traders v. Department of the Treasury, 598 F.2d 1233, 1235 (1st Cir. 1979). Since appellees' suit is against the individual defendants as officials of the United States and not as individuals, reliance on Bivens is misplaced.

Appellees argue their suit alleges a constitutional tort by federal officials, and a waiver of sovereign immunity can be found in the Federal Tort Claims Act. As prerequisite to suit under the Act, the claimant must file an administrative claim with the appropriate federal agency -- in this case the BIA. 28 U.S.C. § 2675(a) (1976); Wright v. Gregg, 685 F.2d 340,

341 (9th Cir. 1982). Since appellees have not filed such a claim, the Federal Tort Claims Act's waiver of sovereign immunity is not available to them.

Finally, it is argued that the per capita and dividend payments withheld from appellees were part of a fund held in trust by the government, that the government breached the trust by determining appellees were not entitled to payments from the fund, and that the subsequent loss of tribal privileges was proximately caused by the government's breach. Moose v. United States, 674 F.2d 1277, 1282-83 (9th Cir. 1982), is cited for the proposition that when Congress declares the government holds funds in trust for Indians, it waives sovereign immunity with regard to damage claims for breach of that trust.

In Moose, plaintiff alleged the government breached the fiduciary duties established by 25 U.S.C. §§ 161a and 162a in the management of funds held in trust for plaintiffs pursuant to the Southern Paiute Distribution Act, Pub. L. No. 90-584, 82 Stat. 1147 (1968). Moose, 674 F.2d

at 1279-80. In this case the government also held in trust the fund from which per capita and dividend payments were made subject to fiduciary duties established by sections 161a and 162a. Here, however, the government has restored the per capita and dividend payments wrongfully withheld from appellees with interest. All that remains is appellees' claim for damages for loss of tribal privileges.

In claiming damages for loss of tribal privileges in the district court, appellees did not argue that the loss was proximately caused by the government's breach of fiduciary duty created by sections 161a and 162a. That argument was first made at oral argument, and consequently we need not address it. See Merchants Refrigerating Co. v. United States, 659 F.2d 116, 117 (9th Cir. 1981).

REVERSED.

FOOTNOTES

1. Although Testan was an appeal from a Court of Claims decision, its reasoning applies with equal force to actions brought in the district courts. See Duarte V. United States, 532 F.2d 850, 851-52 n.2 (2d Cir. 1976).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * * * * * * * * * *

STEVEN MARK HOLLOMAN; MICHAEL JAMES HOLLOMAN; DAVID EMERSON, JR.; and JEFFREY TODD EMERSON; Minor, by his father and next friend, DAVID EMERSON,	)	No. 82-3096
Plaintiffs-Appellees	)	ORDER
v.	)	
JAMES WATT, Secretary of the Department of Interior: FOREST GIRARD, Assistant Secretary of the Bureau of Indian Affairs; SIDNEY MILS, Acting Commissioner of the Bureau of Indian Affairs; United States Department of Interior; BUREAU OF INDIAN AFFAIRS, a subdivision of the United States Department of the Interiors,	)	
Defendants-Appellants.	)	

Before: BROWNING, Chief Judge, FLETCHER and Circuit Judges

In United States v. Mitchell, ___U.S. ___, 103 S.Ct. 2961, 2967 (1983), the Supreme Court held that the Tucker Act, 28 U.S.C. § 1491, itself constitutes a waiver of sovereign immunity for specified types of claims, id. at 2967; that

among those claims are breaches of the United States' fiduciary duty toward Indians arising under federal laws that create a trust relationship, id. at 2971-83; and that the extent of the waiver is defined by the contours of the government's fiduciary responsibility, id. at 2969, 2972. See also Rogers v. United States, 674 F.2d 1277 (9th Cir. 1982). The argument appellees now make based on Mitchell is the same argument appellees made for the first time on oral argument in this court based on Moose v. United States, 674 F.2d 1277 (9th Cir. 1982). For the reasons stated in our opinion this belated claim, which was not considered below, is not properly before us and thus is one we need not, in the exercise of our discretion, address.

The petition for rehearing is denied.

HOLLOMAN v. WATT, No. 82-3096, On Petition for Rehearing

FLETCHER, Circuit Judge, dissenting:

I dissent from the denial of rehearing. This court has discretion to consider arguments not raised at trial. See Hormel v. Helvering, 312 U.S. 552, 556-560 (1941). "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." 312 U.S. at 557. We should exercise that discretion in favor of granting a rehearing in light of United States v. Mitchell, ___ U.S. ___, 103 S.Ct. 2961 (1983). Although appellees did not use the phrase "breach of fiduciary duty" below, the gravamen of their action is a breach of duty owed them under a statute that the Supreme Court recognized in Mitchell created a trust relationship. 103 S.Ct. at 1971, n.24. Appellees can hardly be expected to articulate clearly a cause of action that was recognized by the Supreme Court for the first time after our opinion was filed. "[W]here a new theory or issue has first come to light during the pendency of an

appeal because of a recent change in law, the appellate court may, in its discretion, . . . allow that issue to be raised in the interest of justice." United States v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978)(citations omited).

I would grant the petition for rehearing and remand the case to the district court with instructions to transfer to the Court of Claims under 28 U.S.C. § 1631, because Tucker Act claims over $10,000 must be brought in the Court of Claims. See 28 U.S.C. §§ 1346, 1491. This would enable the parties to brief and present the case in the light of Mitchell to the end that it be decided under the law that should control the result.

STATUTES

25 U.S.C. § 162(a).

The Secretary of the Interior is hereby authorized in his discretion, and under such rules and regulations as he may prescribed, to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States and on which the United States is not obligated by law to pay interest at higher rates that can be procured from banks. The said Secretary is also authorized, under such rules and regulations as he may prescribe, to deposit in banks to be selected by him the funds held in trust by the United States for the benefit of individual Indians: Provided, That no individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate, subject, however, to the regulations of the Board of Governors of the Federal Reserve System in the case of member banks, and of the

Board of Directors of the Federal Deposit Insurance Corporation in the case of insured nonmember banks, except that the payment of interest may be waived in the discretion of the Secretary of the Interior on any deposit which is payable on demand: Provided further, That no tribal or individual Indian money shall be deposited in any bank until the bank shall have furnished an acceptable bond or pledged collateral security therefor in the form of any public-debt obligations of the United States and any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States, except that no such bond or collateral shall be required to be furnished by any such bank which is entitled to the benefits of section 12B of the Federal Reserve Act, with respect to any deposits of such tribal or individual funds to the extent that such deposits are insured under such section: Provided, however, That nothing contained in this section, or in section 12B of the Federal Reserve Act, shall operate to de-

prive any Indian having unrestricted funds on deposit in any such bank of the full protection afforded by section 12B of the Federal Reserve Act, irrespective of any interest such Indian may have in any restricted Indian funds on deposit in the same bank to the credit of a disbursing agent of the United States. For the purpose of this section and said Act, said unrestricted funds shall constitute a separate and distinct basis for an insurance claim: Provided further, That the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States: And provided further, That the foregoing shall apply to the funds of the Osage Tribe of Indians, and the individual members thereof, only with respect to the deposit of such funds in banks

25 U.S.C. § 163.

The Secretary of the Interior is authorized, wherever in his discretion such action would be for the best interest of the Indians, to cause a final roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood, and when approved by the said Secretary are declared to constitute the legal membership of the respective tribes for the purpose of segregating the tribal funds as provided in section 162 of this title, and shall be conclusive both as to ages and quantum of Indian blood: Provided, That the foregoing shall not apply to the Five Civilized Tribes or to the Osage Tribe of Indians, or to the Chippewa Indians of Minnesota, or the Menominee Indians of Wisconsin.

28 U.S.C. § 1491.

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive de-

partment, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such

direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

No. 83-1169

In the Supreme Court of the United States

OCTOBER TERM, 1983

STEVEN MARK HOLLOMAN, ET AL., PETITIONERS

v.

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

MARTIN W. MATZEN
CLAIRE L. MCGUIRE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the United States is answerable in damages for the value of Indian tribal privileges lost by petitioners as a result of tribal action taken on the basis of mistaken information, communicated by Department of Interior officials to tribal officials, as to petitioners' eligibility for membership in the tribe.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 6

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Baciarelli v. *Morton*, 481 F.2d 610 9

Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 5

Duncan v. *United States*, 667 F.2d 36, cert. denied, No. 81-1747 (July 6, 1983) 10

Eastport Steamship Corp. v. *United States*, 372 F.2d 1002 ..... 5, 8

Jacobs v. *United States*, 290 U.S. 13 8

Mitchell v. *United States*, 664 F.2d 265 10

Moose v. *United States*, 674 F.2d 1277 ..... 6, 9

Rowe v. *United States*, 633 F.2d 799, cert. denied, 451 U.S. 970 11

Sac and Fox Tribe v. *Andrus*, 645 F.2d 858 9

United States v. *Mitchell*, 445 U.S. 535 ..... 7, 8

United States v. *Mitchell*, No. 81-1748 (June 27, 1983) 6, 7, 8, 9, 10

United States v. *Testan*, 424 U.S. 392 ..... 5, 7, 8, 9

Page

Constitution and statutes:

U.S. Const.:

Amend. V 2

Just Compensation Clause 8

Due Process Clause 8, 9

Indian Reorganization Act, 25 U.S.C. 461 *et seq.*:

25 U.S.C. 476 *et seq.* 2

Tucker Act:

28 U.S.C. 1346(a)(2) 7, 11

28 U.S.C. 1491 7

28 U.S.C. 1491(a)(1) 7, 11

5 U.S.C. 702 2

25 U.S.C. 162(a) 8

25 U.S.C. 162a 8

25 U.S.C. 163 ..... 4, 8, 9

28 U.S.C. 1331 ..... 2, 4, 5

28 U.S.C. 1343(4) 2

28 U.S.C. 1361 2

28 U.S.C. 2201 2

28 U.S.C. 2202 2

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1169

STEVEN MARK HOLLOMAN, ET AL., PETITIONERS

v.

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C10) is reported at 708 F.2d 1399. The order of the court of appeals upon denying rehearing (Pet. App. D1-D4) is unreported. The district court's findings of fact and conclusions of law (Pet. App. A1-A25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1983. A petition for rehearing was denied on October 18, 1983 (see Pet. App. D1-D2). The petition for a writ of certiorari was filed on January 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners filed this action in the United States District Court for the Eastern District of Washington in 1979. Petitioners claimed that respondents, the Secretary of the

Interior and two named officials of the Department of the Interior sued in their respective official capacities, the Department itself and its Bureau of Indian Affairs (BIA), had erroneously denied them their per capita share of sums due to members of the Colville Indian Tribe. Jurisdiction of the action was alleged to lie under 5 U.S.C. 702 and 28 U.S.C. 1331, 1343(4), 1361, 2201 and 2202, and the Fifth Amendment to the Constitution (E.R. 2).[1] In 1980, petitioners amended their complaint to seek money damages for their loss of certain tribal benefits allegedly attributable to the action of respondents (E.R. 16). At this time two additional bases for jurisdiction were asserted, 25 U.S.C. 163 and sections of the Indian Reorganization Act, 25 U.S.C. 476 *et seq.* (E.R. 14).

The controversy that gave rise to this litigation stems from uncertainty as to the blood degrees of the petitioners. Under the constitution of the Colville Tribe, effective July 1, 1959, no person could be admitted to tribal membership unless he or she possessed at least one-quarter Colville blood (Pet. App. A3-A4). Petitioners, however, share a common ancestor whose own blood degree has been the subject of uncertainty, creating a basis for dispute as to their own eligibility for tribal enrollment. Although the Colville Tribe and the BIA were apparently aware of the underlying uncertainty, petitioners were enrolled in the Colville Tribe in 1966.

In 1969, however, the enrollment application of a distant relative of the petitioners, who shared with them the ancestor of uncertain lineage previously mentioned, drew the BIA's attention to the matter. The BIA responded by adjusting the blood degree of petitioners' common ancestor downward, in conformity with the application of petitioners' relative. As a consequence, petitioners' own blood

---

[1] "E.R." denotes the Excerpt of Clerk's Record filed in the court of appeals.

degrees were recomputed at a level too attenuated to support tribal enrollment. Pet. App. A6. By a September 23, 1971 letter to the chairman of the Colville Business Council, the BIA instructed the Tribe to notify the heads of any affected families of these developments. But no action affecting petitioners' tribal enrollment was taken by the Tribe at that time. Pet. App. C2-C3.

In 1974, however, the BIA advised the Colville Tribe that, based on petitioners' recomputed blood degrees, they were not eligible for "membership enrollment with the Colville Tribes," stating that "action should be taken by the Business Council to remove their names from the roll as they are not eligible for further payments made to members of the tribe" (Pltf. Exh. 12). The BIA's letter stated further that procedures used in the past in similar situations should be followed when action was taken to disenroll petitioners (Pltf. Ex. 12; Pet. App. A10-A11). No notice of the BIA's actions correcting petitioners' ancestor's blood degree was given to petitioners, nor did the Tribe or BIA notify petitioners that there was a problem concerning their enrollment (*id.* at C3). But petitioners ceased receiving their per capita share payments from the BIA as of March 31, 1974 (*id.* at A11, C3).

Pursuant to a written notice dated March 10, 1977, a hearing respecting the eligibility of the petitioners for enrollment in the Tribe was held before the Colville Tribal Enrollment Committee. An attorney appeared on behalf of the petitioners and presented evidence in support of their enrollment. On March 20, 1978, the Business Council of the Tribe formally determined that the four petitioners were not eligible for enrollment because they lacked the required one-quarter Colville blood degree. The disenrollment resolutions of the Tribe were forwarded to the BIA. Before any further action could be taken, petitioners filed this action. Pet. App. A14-A15, C3.

During the course of the proceedings, the BIA discovered entirely new evidence that established that an ancestor of the petitioners different from the one whose blood degree had been debated had a higher quantum of Colville blood than previously had been thought. In light of this new evidence, the Tribe reconsidered its prior disenrollment action, and determined that petitioners were entitled to enrollment and payment of all withheld per capita payments. Pet. App. C4. The district court, however, decided that the re-enrollment of the petitioners by the Tribe did not render this action against federal officials moot (id. at A25).

2. The district court[2] concluded that 28 U.S.C. 1331 provided a jurisdictional basis for the action and that the Tribe was not an indispensable party (Pet. App. A16). The court held that the BIA had denied due process of law to petitioners by its failure to provide notice to them prior to terminating their per capita payments (*id.* at A16-A17) and had violated 25 U.S.C. 163 and its own established procedures in correcting the blood degrees of petitioners (Pet. App. A17-A23). The district court held the respondents liable for damages in the aggregate amount of $105,000, plus interest, for petitioners' "loss of tribal identity and the benefits attendant to being a member of the [Colville] tribe" including fishing, hunting and woodcutting rights, tribal employment preferences, tribal grant and loan programs and cultural benefits of tribal membership (*id.* at A14, A24, B2-B3). The court also ordered restoration of withheld per capita payments (*id.* at B3).

Because of the discovery of the new information that validated petitioners' claim of eligibility for enrollment and the Colville Tribe's rescission of its disenrollment resolutions, the BIA released the per capita payments that had

---

[2]The action was tried to a United States Magistrate by consent of the parties (see Pet. App. A1).

been withheld from petitioners, satisfying that portion of the district court's judgment (Pet. App. C5). But the respondents appealed from the award of money damages based upon the petitioners' loss of the other benefits of tribal membership.

3. The court of appeals reversed the challenged award of damages (Pet. App. C1-C10). The court concluded (*id.* at C5-C9) that petitioners' claim for these money damages did not rest upon "any federal statute [that] 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (*id.* at C5, quoting *United States* v. *Testan*, 424 U.S. 392, 400 (1976), quoting *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). The court observed that, contrary to petitioners' contentions, 28 U.S.C. 1331 does not authorize recovery of damages against the United States (Pet. App. C6). Petitioners' reliance upon *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was misplaced, the court observed, because this is an action against agencies of the United States and officers sued in their official capacities, rather than a damages action against individuals (Pet. App. C6-C7). Nor could the damage claim be entertained under the Federal Tort Claims Act because petitioners had not filed the required administrative claim (Pet. App. C7-C8). Finally the court of appeals held that the particular damages in dispute were not recoverable on the theory that the government had breached a fiduciary duty governing its management of Indian property. Observing that the government had restored the per capita payments that had been withheld from petitioners, payment of which was subject to an obligation of trust, the

court of appeals distinguished its own decision in *Moose* v. *United States*, 674 F.2d 1277 (1982). Pet. App. C8-C9.[3]

Petitioners sought rehearing, asserting that this Court's intervening decision in *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983) (*Mitchell II*), supported their damages claim. The court of appeals denied the petition for rehearing in a brief supplemental order (Pet. App. D1-D2). The court recognized that *Mitchell II* makes clear that "the Tucker Act, 28 U.S.C. § 1491, itself constitutes a waiver of sovereign immunity for specified types of claims" (Pet. App. D1) and that "among those claims are breaches of the United States' fiduciary duty toward Indians" (*id.* at D2). But the court of appeals explained that the teaching of *Mitchell II*, prefigured in its own decision in *Moose* (see note 3, *supra*), did not alter the fact that petitioners had not argued in a timely manner that damages for their loss of tribal membership were traceable to any breach of fiduciary duty. "[I]n the exercise of * * * discretion" the court adhered to its decision to decline to address the petitioners' tardily advanced theory (Pet. App. D2).[4]

ARGUMENT

Petitioners' argument that the court of appeals' decision is inconsistent with this Court's decision in *Mitchell II* rests upon a misapprehension as to the basis for the decision below.

---

[3]In *Moose* the court of appeals had held that damages are recoverable from the United States for mistakes in the disbursement of a tribal judgment fund. Because petitioners had not claimed, prior to oral argument, that their damages for loss of tribal status were proximately traceable to a breach of fiduciary duty, the court of appeals declined to consider that argument (Pet. App. C9).

[4]Judge Fletcher dissented from the denial of rehearing (Pet. App. D3-D4), suggesting that the court should exercise its discretion to entertain petitioners' new contentions, and, without reaching the merits, remand the case to the district court with instructions to transfer it to the Claims Court, which could pass on the applicability of *Mitchell II* in the first instance.

1. In *Mitchell II* this Court made clear that the Tucker Act, 28 U.S.C. 1491 and 1346(a)(2), waives the sovereign immunity of the United States as to the classes of claims described in the Act, including those "founded either upon the Consitution, or any Act of Congress, or any regulation of an executive department or upon any express or implied contract with the United States" (28 U.S.C 1491(a)(1)). Slip op. 6-10. The Court thus disavowed certain dicta in *United States* v. *Testan*, 424 U.S. 392, 398, 400 (1976), and *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (*Mitchell I*), that suggested that the Tucker Act does not waive sovereign immunity (slip op. 10). At the same time, however, the Court expressly reaffirmed that, as it had *held* in *Mitchell I* and *Testan*

> [T]he Tucker Act " 'does not create any substantive right enforceable against the United States for money damages.' " *United States* v. *Mitchell*, 445 U.S., at 538, quoting *United States* v. *Testan*, 424 U.S., at 398. A substantive right must be found in some other source of law, such as "the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U.S.C. § 1491. Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, see *United States* v. *King*, 395 U.S. 1, 2-3 (1969), and *the claimant must demonstrate that the source of substantive law he relies upon " 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.' "* *United States* v. *Testan*, 424 U.S., at 400, quoting *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967).

Mitchell II, slip op. 10-11 (emphasis added; footnotes omitted).

In light of the foregoing statement of the applicable principles, petitioners' assertion (Pet. 6-8) that the decision below conflicts with *Mitchell II* is frivolous. Although the court of appeals' opinion occasionally employs the imprecise sovereign immunity terminology derived from *Mitchell I* and *Testan* that was discarded in *Mitchell II*, see Pet. App. C2, C5, the standard employed by the court of appeals for determining whether petitioners' claim for damages could be maintained was precisely the one this Court has enunciated: whether the statutory predicate for the claim " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " Compare *Mitchell II*, slip op. 22 with Pet. App. C5 (each quoting *Testan*, 424 U.S. at 400, quoting *Eastport Steamship Corp.*, 372 F.2d at 1009). Thus, the Court's clarification, in *Mitchell II*, that the question whether a particular statute can support a claim for damages under the Tucker Act is not one of sovereign immunity in no respect calls in question the decision by the court of appeals in this case.[5]

2. a. Petitioners assert (Pet. 8-11) that 25 U.S.C. 162a and 163 impose fiduciary duties upon the United States with respect to Indian funds held by the United States and that damages are recoverable for the breach of such duties.[6]

---

[5]In *Mitchell II* the Court emphasized (slip op. 10) that its ruling did not "in any way question[] the result" in *Testan* or *Mitchell I*, which in no sense depended upon the use of the sovereign immunity terminology in those opinions. The decision below is similarly unaffected by *Mitchell II*.

[6]We assume that petitioners intend to invoke 25 U.S.C. 162a, rather than 25 U.S.C. 162(a). See Pet. App. E1-E3.

We note that petitioners apparently have abandoned any claim that damages are due for a denial of due process. The due process branch of the district court's decision apparently supported only the direction that withheld per capita payments be restored (see Pet. App. A16-A17). In any event, unlike the Just Compensation Clause, see *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933), the Due Process Clause does not mandate

The fundamental flaw in petitioners' argument is that the court of appeals, relying on its own decision in *Moose* v. *United States*, 674 F.2d 1277, 1282-1283 (1982), which foreshadowed *Mitchell II* in this respect, *agreed* that "[i]n this case the government also held in trust the fund from which per capita and dividend payments were made subject to fiduciary duties established by [25 U.S.C.] 161a and 162a" (Pet. App. C9). And the court of appeals *agreed* that these provisions would ground an action to recover "per capita and dividend payments wrongfully withheld" (*ibid.*). But because those sums had been paid by the government and because it was not apparent that the separate items of damage claimed here were proximately traceable to the government's alleged breach of fiduciary duty, the court of appeals declined to uphold the damage award absent a timely argument by petitioners making the necessary connection (*ibid.*).[7] *Mitchell II*, the court of appeals pointed out

---

the availability of a compensatory remedy. Accordingly, except perhaps to the extent that recovery is sought of sums "improperly exacted or retained" (*Testan*, 424 U.S. at 401), invocation of the Due Process Clause could not advance petitioners' cause. Of course, unlike the withheld per capita payments that have now been restored to petitioners, the particular damages in issue here could not by any stretch of the imagination be deemed compensation for monies wrongfully exacted or retained by the United States.

[7]Reliance upon 25 U.S.C. 163 does not advance petitioners' claim for damages for loss of benefits of tribal membership. That statute authorizes the Secretary to prepare a tribal membership roll to govern distribution of trust assets. See *Baciarelli* v. *Morton*, 481 F.2d 610, 612 (9th Cir. 1973). Nothing in Section 163 suggests that it makes the United States liable for the indirect effects of tribal decisions as to membership that do not involve distribution of trust property. Cf. *Sac and Fox Tribe* v. *Andrus*, 645 F.2d 858, 860 (10th Cir. 1981). (The Secretary of the Interior has advised us, we note, that the Tribal roll of the Colville Tribe was not prepared pursuant to 25 U.S.C. 163. A contrary stipulation entered by government counsel in district court was erroneous. Under the decision of the court of appeals it does not matter whether Section 163 is applicable or not.)

in denying rehearing (Pet. App. D2), made no material change in the applicable law in the Ninth Circuit and accordingly did not in any way excuse petitioners' failure to establish an essential predicate for their claim.[8]

b. Petitioners do not appear to challenge the court of appeals' conclusion (Pet. C9) that damages recoverable for breach of trust in the management of Indian funds are limited by a principle of proximate causation. That conclusion plainly is correct. In its decision in *Mitchell II*, subsequently affirmed by this Court, the former Court of Claims held that damages available for breach of trust are limited to "direct loss or diminution in value of [Indian] property (and its proceeds) due to mismanagement by federal officers." *Mitchell* v. *United States*, 664 F.2d 265, 273-274 (1981) (en banc). By contrast, "plaintiffs are not entitled to sue for other types of damages or compensation: indirect or consequential business, economic, or personal damages, * * * or personal, psychological, or social harm experienced by Indian owners * * *" (*ibid.*). See also *Duncan* v. *United States*, 667 F.2d 36, 46-49 (Ct. Cl. 1981), cert. denied, No. 81-1747 (July 6, 1983). No contrary authority is cited by petitioners and we are aware of none.

3. We note that, as petitioners concede (Pet. 8), they never pleaded the Tucker Act as a jurisdictional basis for this action. Indeed, in the court of appeals petitioners argued (Br. 14, 16) that the gravamen of their claim was that they had suffered a "constitutional tort" (see page 5,

---

[8]Accordingly, it simply is not correct to suggest that petitioners' failures of pleading and proof are attributable to a failure to anticipate *Mitchell II* and should be excused. Compare Pet. 11. We note, as well, that Judge Fletcher's dissent from the denial of rehearing does not suggest, as petitioners imply (Pet. 9), that the damages petitioners seek are properly recoverable. She merely suggested that the case be transferred to the Claims Court for a decision. See page 6 note 4, *supra*.

supra) and that this case accordingly was "exclude[d]" from the coverage of the Tucker Act (see 28 U.S.C. 1491(a)(1)) and that assertion of jurisdiction under that statute would be "improper." Even assuming that petitioners were free at the eleventh hour to reverse field, style their claim as one for breach of trust, and rely upon the Tucker Act,[9] that claim must fail for the reason given by the court of appeals: no statute contemplates compensation for the class of injuries allegedly suffered here.[10]

---

[9]The court of appeals' decision does not rest upon any failure of pleading in these respects. See pages 5-6 & note 3, *supra*.

[10]Of course, if damages had been sought under the Tucker Act on a breach of trust theory, jurisdiction would lie only in the Claims Court, because, as Judge Fletcher recognized (Pet. App. D4), the amount of damages sought exceeds the monetary limit applicable to district court Tucker Act jurisdiction under 28 U.S.C. 1346(a)(2). Contrary to petitioners' contention (Pet. 12 n.4), *Rowe* v. *United States*, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981), does not suggest otherwise. There the court of appeals merely held that joinder of a claim for money damages in excess of $10,000 with a claim for judicial review of administrative action did not strip the district court of jurisdiction over the non-damages claim. The court made clear "that such joinder does not give the district court jurisdiction over the claim for damages in excess of $10,000" (633 F.2d at 802).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

MARTIN W. MATZEN
CLAIRE L. McGUIRE
Attorneys

APRIL 1984

DOJ-1984-04